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IN THE

Supreme Court of the United States

October Term, 1932.

No. 634

DAVID DAUBE,

Petitioner,

v.

THE UNITED STATES,

Respondent.

REPLY BRIEF FOR PETITIONER.

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May It Please The Court:

The Government in its brief states that the petitioner failed to plead an account stated and that this failure should not be overlooked because if it had pleaded an account stated the Government would have defended on the ground of mistake and that the opinion of the Court indicates that a mistake was made in the issuance of the schedule of overpayments in the case at bar.

In the case at bar no evidence by witnesses was offered. All the facts were stipulated and upon this stipulation the case was submitted to the Court. At the time this stipulation was entered into the Government notes in its brief the decision of this Court in the *Bonwit Teller case* was not rendered. Under the decision of the Court of Claims in that case the Government had a good defense to the suit for the recovery of the 1919 overpayment because it was not brought within five years of the date of the payment of the tax. Apparently it did not anticipate the reversal of that decision by this Court and having a good defense under that decision as it then stood, it is doubtful if it would have attempted to offer any evidence of mistake even if such evidence existed.

But this may be put to one side because there was no mistake in the case at bar with reference to the 1919 overpayment, which is the only one in issue here. The schedule signed by the Commissioner contained two items and they were, the item of $10,874.64 for 1918 and the item of $2,628.26 for 1919. With reference to the 1918 item the Court of Claims intimated that the schedule may have been issued by mistake because of the fact that an agreement was signed authorizing the application of this 1918 overpayment to the partnership's 1917 tax. This, however, *has no application whatever to the item of overpayment for the year 1919* because no agreement was signed with reference to that. There was obviously no possibility of mistake concerning the 1919 item.

As stated in our main brief and as noted by this Court in *Wisconsin Central Railroad Company v. United States, 164 U. S. 190, 212*, the rules of common law pleading do not obtain in the Court of Claims. All that is required is

a plain statement of the facts. Where these facts are stipulated by the Government without any objection being made to the pleadings it would seem apparent that any rule of law which will support recovery may be applied to the facts so stipulated. The right to recovery grows out of the facts and not out of the pleadings.

However, in the instant case the petitioner in its petition in paragraph eight thereof on page 4 of the Record, alleged the allowance of the overpayment of $13,502.90 by the Commissioner of Internal Revenue and the issuance of the Treasury check for this sum and alleged further "that there exists no warrant in law for the crediting of $13,502.90 of said overpayment *allowed by the Commissioner of Internal Revenue* against the alleged additional 1917 tax of Westheimer & Daube." Annexed to and made a part of this paragraph of the petition was a letter of the Treasury Department, which is contained on page 6 of the Record and which gives the number and amount of the check and the two items of the overpayment as well as the number of the schedule.

THE ALLOWANCE OF THE OVERPAYMENT BY THE COMMISSIONER OF INTERNAL REVENUE GAVE RISE TO THE CAUSE OF ACTION ON WHICH THIS SUIT WAS BROUGHT.

Petitioner maintains that it is the allowance of the overpayment by the Commissioner of Internal Revenue which gives rise to a cause of action in these cases and not the delivery of the Certificate of Overassessment by the Collector of Internal Revenue to a taxpayer, as contended by the respondent. The entire procedure in connection with the allowance of an overpayment is set forth by this Court in the case of *United States v. Swift & Company, 282 U.*

S. 468, at pages 471-474. With reference to the Certificate of Overassessment, the opinion at page 473 shows that it is prepared and mailed to the Collector of Internal Revenue with the refund check "to be by him mailed to the taxpayer."

When the Commissioner has signed the schedule for the second time and has mailed a Certificate of Overassessment to the Collector, he has done all that he can do in the matter. His action in allowing the overpayment creates the claim against the United States and not the action of the Collector in mailing notice of overpayment. In the case of *Bonwit Teller & Company, 283 U. S. 258,* the Court said at *page 265:*

> "The action is not for the overpayment of the tax in 1919, *but is grounded upon the determination* evidenced by the Certificate issued by the Commissioner May 12, 1927." (Italics ours.)

The Court will observe that it is the determination of the Commissioner upon which the action is grounded and that the Certificate of Overassessment (not its mailing to the taxpayer) is merely evidence of it. In the *Bonwit Teller case* the Court added:

> "Upon delivery of the Certificate to the plaintiff there arose the cause of action on which this suit was brought."

This last statement was unnecessary to a decision in the case and was dictum. Certainly the Court could not have meant by it that the mere failure of the Collector to mail a Certificate to the petitioner could deprive the petitioner of a cause of action based on the allowance of the claim by the Commissioner of Internal Revenue. The cases cited by the Court in the *Bonwit Teller case* and quoted from on pages 10-12 of our main brief do not state that the

delivery to a claimant of a Certificate of Overassessment is necessary to give rise to a cause of action. The *Kaufman case* states:

> "*The allowance of a claim* under this statute is equivalent to an account stated." (Italics ours.)

The case of *United States v. Savings Bank, 104 U. S. 728*, states at page *733*:

> "And we held that *the allowance of a claim by the Commissioner* under this section was equivalent to an account stated." (Italics ours.)

Nothing is said in that case or in the *Kaufman case* about the significance of the delivery of a Certificate of Overassessment being essential to the creation of a cause of action. Indeed, as will be fully pointed out on page 7 of this brief, no Certificate of Overassessment can be mailed to the taxpayer by the Collector until after the Disbursing Clerk of the Treasury Department has issued the check, for the reason that the Certificate of Overassessment is mailed to the Collector at the same time that the refund check is mailed to him. The Commissioner can only direct the Disbursing Clerk of the Treasury Department to issue the check. He cannot compel him to do so. As said in *United States v. Real Estate Savings Bank, 104 U. S. 728*:

> "Under *Section 3220* he is to 'refund' and 'pay back'. Payments of money in both cases must be made by the Accounting Officers of the Treasury Department as he is not himself a Disbursing Officer."

The Court then goes on to say at page 733 of its opinion in that case what is quoted on page 11 of our main brief, that if by reason of the refusal of the Disbursing Officer to pay the claim

> "after it has once *been allowed by the Commissioner, the allowance may be used as the basis of an action against the United States* in the Court of Claims where it will be *prima facie* evidence of the amount that is due, and put on the Government the burden of showing fraud or mistake."

And again in that case the Court said with reference to the Commissioner's allowance, "such *allowance raised an implied promise on the part of the United States* to pay any amount that might actually be due the claimant." It is the allowance of the claim by the Commissioner that raises the implied promise and not the receipt in the mail by the taxpayer of the Certificate of Overassessment.

In the case at bar the procedure was the same as that stated in the *Swift & Company case, 282 U. S. 468*, except that it does not appear that the Certificate of Overassessment was mailed to the taxpayer. It does appear, however, from the opinion of the Court that one was issued. In that opinion the Court says in the last paragraph at the bottom of page 23 of the Record and at the top of page 24:

> "It is true that by some oversight the Commissioner subsequently prepared a letter stating the amount of the overassessment, which, with the check for the amount thereof was sent to the Collector. But the Collector perceiving the error did not forward the check or the letter to the plaintiff but returned it to the Commissioner."

In the *Swift case* this Court held that the limitation on the right of a taxpayer to file a refund claim began to run from the date of the approval of the final schedule. Nothing is said about it beginning to run from the date of the delivery of the Certificate of Overassesment to the taxpayer.

The issuance of the Certificate of Overassessment or even the payment of a refund does not prevent the Commissioner from changing his decision in the matter. By the recent Revenue Act he is allowed two years after making an erroneous refund to sue to get it back. Prior to that time the law apparently contained no limitation.

However, with respect to this 1919 overpayment in issue there was not an iota of evidence that the Commissioner ever would change his decision or that he ever did change his decision. The fact is that the Commissioner never changed his decision concerning it.

REPLY TO THE ARGUMENT THAT RECOVERY SHOULD BE DENIED BECAUSE NO CLAIM FOR REFUND WAS FILED WITHIN FIVE YEARS FROM THE DATE THE RETURN WAS DUE.

Section 252 of the Revenue Act of 1921 cited by the Government deals with the action of the Commissioner. So far as the Commissioner is concerned he has "allowed or made" a refund when he signs the final schedule of overassessments. *Girard Trust Company v. United States, 270 U. S. 163.*

All the Commissioner can do is allow a refund. He cannot pay the same. As stated in *United States v. Swift & Company, 282 U. S. 468*, at page *473:*

> "The Commissioner would certify the schedule of refunds, thus directing the disbursing clerk of the Treasury to draw checks for refunds shown on the schedule."

The Disbursing Clerk of the Treasury is not an employe of the Bureau of Internal Revenue and if he does not draw the check the Commissioner cannot compel him to do

so. This was recognized by this Court in the *Blair case* in the quotation on page 5 of this brief. However, in the case at bar the Disbursing Clerk of the Treasury did draw the check and issue it well within the five-year period.

By its argument the Government would have this Court construe the word "made" as used in *Section 252 of the Revenue Act* to mean "paid". If Congress had meant "paid" it could have said so. The rule of construction is stated in *Bonwit Teller & Company v. United States, 283 U. S. 258*, at page *263*, as follows:

> "The section is a part of a tax law giving to taxpayers opportunity to secure refund of overpayments that had become barred. Manifestly it is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide." (Citing cases.)

To hold this word to mean "paid" is to disregard the rule requiring it to be construed liberally in favor of taxpayers. The words of the statute are "no such credit or refund shall be allowed or made after five years from the date when the return was due." The word "allowed" in the statute is obviously used with reference to credits and the word "made" in the statute is used with reference to refunds. *Section 252* is placed in the statute solely to govern the actions of the Commissioner of Internal Revenue. As pointed out above, all the Commissioner can do is allow or make the refund. When he has done that he has exhausted his powers. He cannot pay it. One consequence of construing the word "made" in *Section 252* to mean "paid" would be to put credits and refunds on a different basis. A taxpayer is allowed a credit when the Commissioner signs the second schedule. *(Swift & Company case, 282 U. S. 468.)* There is no reason for distinguishing and discriminating between cases of credits and

cases of refunds. The significance of this was appreciated by the Court in *United States v. Swift & Company, 282 U. S. 468*, at page *476*, wherein it said:

> "This construction of the Act brings about uniformity in administration, as it makes the allowance of credits and refunds simultaneous."

One consequence of construing "made" to mean "paid" would be that if a check for refund was issued to taxpayer a few days before the end of the five-year period, but the taxpayer did not present it for payment until after the five-year period then the Treasury could not pay it. If the taxpayer lived in the Philippine Islands or Alaska, or was in Asia, it might be six months before the check would reach the Treasury Department for payment. Furthermore, *Section 252* is purely an administrative measure dealing with the Commissioner's office and it was not intended to regulate suits in Court which are regulated by *Section 3226 of the Revised Statutes* and as pointed out in our main brief this Court has held in the *Bonwit Teller case* that *Section 3226 of the Revised Statutes* has no application to a case where the Commissioner has made a timely allowance of a refund.

In *Sol. Op. 106*, published in Cumulative Bulletin No. 4 at page 339, the Treasury Department construes *Section 252*, with reference to credits and uses the words "made or allowed" as if they were synonymous.

It frequently happens that after the Commissioner has "made or allowed" a refund the Disbursing Clerk cannot obey the order to pay it for the reason that there is no appropriation available out of which to make the payment and it is necessary for the Disbursing Clerk to wait until Congress makes an appropriation for the payment of the

refund. The Commissioner's final action in the case, however, takes place when he signs the final schedule. After that he has nothing further to do with the case. So far as he is concerned he has "made" the refund when he signs the schedule.

The only importance of the refund claim in the case of *Bonwit Teller & Company, 283 U. S. 258*, was that if none had been filed the allowance of the Commissioner would have been made after the statute of limitations had barred the right of the Commissioner to make an allowance. As stated in the dissenting opinion of Judge Littleton:

> "In that case the time for allowing an overpayment without a claim had expired." (R. 28.)

In the last paragraph of its brief the Government states that the Court of Claims has not allowed recovery in any case based upon an account stated where a timely claim for refund was not filed. We may advise the Court that we know of no case in which the Court of Claims has allowed recovery in recent years based upon an account stated, regardless of whether a timely claim for refund was filed or not, except pursuant to the mandate of this Court in the *Bonwit Teller case*.

All of which is respectfully submitted.

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Chicago,
April 8, 1933.